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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 660

BEN H. BROWN,

Petitioner,

against

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Solicitor General
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Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

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To The Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes the respondent, the Attorney General of the State of New York, *pro se*, and opposes the petition herein and asks that it be denied.

New York Court Opinions

In the New York courts, this case is reported at 204 Misc. 661 (Surr. Ct., N. Y. Co.) 124 N.Y.S. 2d 793 (1953); reversed, 283 App. Div. 463 (1st Dept.), 128 N.Y.S. 2d 738 (1954); aff'd 8 N. Y. 2d 1093 (1960).

Preliminary Facts

Ike Menschefrend died on July 9, 1949, intestate, allegedly a resident of California, possessed of three savings accounts in New York City banks, in addition to substantial property in California. In September, 1949, the petitioner, who was then the Public Administrator of Los Angeles County, California, was appointed administrator of the decedent's California estate. Then, without the notice to the New York Attorney General required by New York law (*Matter of Bakerman*, 268 App. Div. 21, 26 [1st Dept., 1944], aff'd 295 N. Y. 811 [1946]), he procured ancillary letters of administration from the Surrogate's Court of New York County (24).

Upon the basis of the ancillary letters issued by the New York Surrogate's Court, all three savings accounts were released to the petitioner. In a *pro forma* proceeding, the New York estate was exempted from payment of any New York transfer tax on or about September 23, 1951 (39).

As ancillary administrator of the New York estate, the petitioner did not issue any citation to the New York Attorney General until he sought judicial approval of his accounts by the New York County Surrogate (26). The Surrogate then issued his *citation* dated October 6, 1952, returnable November 18, 1952, to all parties *designated by the petitioner* as proper parties to the proceeding (24-25, 80-86).

The Citation in the Accounting Proceeding

This citation dated October 6, 1952, was issued not only to the Attorney General, but also to the California Attorney General and "all heirs at law, next of kin, devisees, legatees, distributees, grantees, assignees, lienors, trustees, executors, administrators and successors in interest" of the decedent; and "if they, or any of them be dead, the

respective heirs at law, next of kin, devisees, legatees, distributees, grantees, assignees, creditors, lienors, trustees executors, administrators and successors in interest of the aforesaid persons, all of whom and whose names and places of residence" were stated (in the citation) to be "unknown to the petitioner, and cannot be ascertained after due diligence, being the persons interested as creditors, legatees, devisees, beneficiaries, distributees, or otherwise" in the estate of the decedent, whose last-known address in Los Angeles, California, was set forth (81-86).

Service of the Citation

The citation, by direction of the New York Surrogate, dated October 6, 1952 was served *by mail* on the Attorney General of California and was published in two newspapers. (See Appendix A.) The petitioner's attorney, by his affidavit dated June 30, 1953, filed, in support of his petition, proof of such service and due publication of the citation in the manner prescribed by sections 55 and 60 of the Surrogate's Court Act. (See Appendix B.)

Accounting Proceedings Before the Surrogate

In the *petition* for settlement of his accounts, it was revealed, for the first time, that the petitioner had, despite due diligence, been unable to find any trace of any heirs or next of kin of the decedent (27, 32, 51-53, 68-69). He asked that his accounts be settled and that the net estate be paid to himself, as domiciliary administrator (35).

The New York Attorney General then appeared in the accounting proceeding in response to the citation; and, apprised of decedent's intestacy and the petitioner's allegations that the decedent had left no known heirs (31-32), opposed the transmission to California of the net estate, left in New York by the decedent (96). The California

Attorney General did not appear in the case, even though he had been served with the citation (Appendix B).

No hearing was requested of the Surrogate by either the petitioner or the Attorney General with relation to the issues presented by the petition and answer..

The Surrogate directed that the net estate be paid to the petitioner, as domiciliary administrator. He held inapplicable Surrogate's Court Act, § 272, which requires payment to the State Comptroller "for the benefit of the person or persons who may thereafter appear to be entitled thereto" of any distributive share of an estate where "the person entitled" is unknown (20). The Surrogate held the domiciliary administrator to be a "person entitled" under § 272 (107).

The Appellate Division Opinion

The Appellate Division reversed the Surrogate's decree, holding unanimously that the petitioner was *not* a "person entitled" within the meaning of Surrogate's Court Act, § 272. The Court construed the New York statute in its use of the words "person entitled" to refer only to "one entitled to succeed to the estate of the decedent, not one who is entitled to administer the estate" (172).

The Appellate Division observed that, under the terms of Surrogate's Court Act, § 272 and Abandoned Property Law, § 600, it would have concluded that the decedent's accounts in New York Banks would constitute abandoned property under the New York Law, if he had been a New York domiciliary (169-173). It then examined the New York Law of "distribution of estates" to ascertain whether that law required that custody of the accounts should be turned over to the domiciliary administrator, instead of to the New York State Comptroller because the intestate had not been a New York domiciliary (173).

The Appellate Division concluded that the New York law of distribution of estates did not require such transmission (174-187). It examined the provisions of Surrogate's Court Act, § 164, and noted that although that section ordinarily required transmission of an ancillary estate, located here, to the domiciliary estate for distribution according to its law, those provisions were applicable only where property of the decedent was to pass "by succession" (174); and that Section 164 was inapplicable where no property of the decedent was to pass "by succession" by reason of the absence of heirs (187).

Surrogate's Court Act, § 164, was construed not to require transmission "especially if the law of escheat recognized a local situs for these New York funds rather than a situs of domicile as in the case of ordinary intestate succession" (175). The Appellate Division noted that in the escheat cases, no "sucession" of estates was involved; that the property, being left without an owner, was "property at large or *bona vacantia*", deemed property of the sovereign, wherever found; and "the sovereign recognized no situs but its own" (176-177). In substance, then, the Appellate Division construed the law of escheat to recognize the *local situs* of bank accounts where the death of an intestate without heirs prevented their passing "by succession" (176-187).

Remission to the Surrogate's Court

The Appellate Division, upon reversal of the Surrogate, remitted the matter to him for further proceedings to ascertain whether the decedent's California funds were sufficient to meet all claims of creditors and administration expenses and to ascertain whether there was any claim that any tax problem was involved. The Court noted that it had assumed that the California funds were sufficient to meet all such claims (187-188).

Upon settlement of the decree of reversal before the Surrogate, the petitioner conceded the correctness of the assumptions made by the Appellate Division; and conceded the sufficiency of the California funds to meet all claims against them (144-146).

No claim was made by petitioner upon the remission to the Surrogate that the Appellate Division order of reversal constituted a violation of anyone's federal constitutional rights. On the contrary, the petitioner stated that he did not intend to apply to the Surrogate for further proceedings; and urged the Surrogate to enter a decree which would "not contain any provision for further proceedings" (146).

Such a decree was, accordingly, entered on June 23, 1954 (138); and the petitioner was directed to pay over to the New York State Comptroller the balance of the estate (140). The Surrogate's order was obeyed by the petitioner. On or about July 24, 1954, he paid over to the Comptroller the sum of $8,564.07.

In the Court of Appeals

An appeal was taken by the petitioner to the New York Court of Appeals from the order of the Appellate Division reversing the Surrogate and from the Surrogate's decree entered upon the order of reversal (115-124). But prosecution of the appeal was delayed by the petitioner and no brief was submitted by the petitioner in support of his appeal until February, 1959.

Not until the oral argument of petitioner's appeal in the Court of Appeals on October 6, 1960 did petitioner raise any federal constitutional question in this proceeding. The Court of Appeals granted him permission to file a reply brief, incorporating his constitutional objections. Pursuant to such permission, he filed with the Court of Appeals the reply brief designated as Appendix C to his petition (pp. 15-20).

The Court of Appeals wrote no opinion, but unanimously affirmed the decree entered upon the Appellate Division order. It thereafter granted the petitioner's motion to amend its remittitur to indicate that it had passed upon the constitutional questions presented by the petitioner—that Abandoned Property Law, § 600, paragraph 1 (b) and Surrogate's Court Act, § 272 and the Appellate Division order and decree entered thereon were void, and unconstitutional, as denying due process under the Fourteenth Amendment—and that it had held that there was no violation of petitioner's rights under that Amendment (Appendix A to petition; pp. 9-11).

Reasons for Denying the Writ

1.

The alleged constitutional questions presented by the petition were belatedly raised. Not until oral argument in the Court of Appeals did the petitioner suggest to the New York courts the existence of any federal constitutional question.

2.

The petition completely ignores the existence in the New York Surrogate's Court Act of provisions assuring the giving of adequate notice of proceedings pending in that Court to persons interested in those proceedings. Surrogate's Court Act, §§ 55-62.

3.

This proceeding was instituted by the petitioner himself. He certainly had notice of its pendency and has had a full opportunity to assert his claim to the fund before the New York Courts. He certainly has not lacked notice of these proceedings or been uninformed as to their disposition. Indeed, his own attorney subscribed to the affidavit of regularity required by the New York Surrogate, and by which the petitioner sought to obtain approval of his peti

tion to settle his accounts, upon the representation made by the petitioner and his attorney that proper notice had been given to any persons that might be interested in the estate, in accordance with the requirements of Surrogate's Court Act, §§ 55, 56, 57-a, 58-a, 59 and 60 (see Appendix A).

4.

The Attorney General of California had notice of the petitioner's application to settle his accounts and did not choose to appear in the proceeding. The status of the *petitioner* to raise the constitutional questions presented upon behalf of the decedent's alleged "unknown heirs" may be subject to some doubt. But even if there were no such doubt, the New York Surrogate's Court Act expressly places upon the New York State Comptroller, all custodial responsibility for the holding of funds belonging to unknown persons. Surrogate's Court Act, § 272.

5.

In a similar situation, involving a claim by the petitioner to a bank account left in Michigan by a California decedent, who died intestate and without heirs, this Court denied certiorari even though the Michigan courts had directed that the bank account, as well as certain bonds and stocks left with a Detroit bank for safekeeping, be turned over to the Michigan State Board of Escheats, as an escheated estate. *Re Rapoport*, 317 Mich. 291, 26 N. W. 2d 777 (1947), cert. den. sub nom. *California* v. *Michigan State Board of Escheats*, 332 U. S. 764 (1947).

6.

Bona vacantia are subject to control by the sovereign in whose jurisdiction they are found. Goodrich, *Conflict of Laws* (3d Ed., 1949), § 181, p. 539; 2 Beale, *Conflict of Laws* (1935), § 303.2, pp. 1031-2; § 309.4, pp. 1052-1060. See also *Re Barnett*, (1902) 1 Ch. 847, 3 B.R.C. 198; *Estate of Bell* (1908), 52 Sol. J. (Eng.), 600; *Estate of Musurus*

(1936), 2 All Eng. 1666, 80 Sol. J. 637; *Estate of Maldonado* (1953), 2 All Eng. 1579 (C. A.).

But even if this case involved an absolute escheat and even if petitioner were assumed to represent the sovereign interests of California, petitioner's position here would have to be regarded as inconsistent even with some basic California law. For it has been recognized in California that escheat does not involve a succession to property, but the opposite of succession. *Estate of Miner*, 143 Cal. 194, 198, 207, 76 Pac. 968 (1904).

An isolated decision, contrary to the general property rule set forth in this subdivision as to *bona vacantia* was announced in *In re Lyons' Estate*, 175 Wash. 115, 26 P. 2d 915 (1933). The *Lyons* decision was criticized by Professor Beale (2 BEALE, op. cit., § 309.1, p. 1039); and in the *Rapoport* case (*supra*), in which this Court refused to grant a writ of certiorari, Michigan declined to follow the *Lyons* decision.

7.

This Court has recognized that bank accounts have a *situs* where a bank has its place of business. *Security Savings Bank* v. *California*, 263 U. S. 282 (1923). The state in which the bank is located was there held to have the same dominion over such intangible property located within its borders as it has over tangible property. As in *Provident Savings Institution* v. *Malone*, 221 U. S. 660 (1910), this Court held in the *Security Savings Bank* case, that the due process clause was not violated by a law requiring a bank to pay over to the state, as depositary, savings deposits which had long remained unclaimed in banks located within the state. Procedural, as well as substantive, aspects of the due process argument were there considered and rejected (263 U. S. at pp. 286-290).

CONCLUSION

The writ of certiorari petitioned for should be denied.

Dated: New York, N. Y.
February 24, 1961.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney Pro se
80 Centre Street
New York 13, New York

PAXTON BLAIR
Solicitor General

DANIEL M. COHEN
Assistant Attorney General
of Counsel.

APPENDIX A

Order of Publication

At the Surrogate's Court of the County of New York, at the Hall of Records in said county, on the 6th day of October, in the year one thousand nine hundred and fifty-two.

Present: HONORABLE WILLIAM T. COLLINS, Surrogate.

IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE ACCOUNT OF PROCEEDINGS OF BEN H. BROWN, as Ancillary Administrator of IKE MENSCHEFREND, also known as I. MENSCHEFREND, IKE MENSCHFRID, IKE MENSCHFRIED, and as IKE MENSCHFIELD, Deceased.	ORDER OF PUBLICATION (Accounting)

Upon filing the verified petition of Ben H. Brown, as Ancillary Administrator of Ike Menschefrend, also known sa I. Menschefrend, Ike Menschfrid, Ike Menschfried, and as I. Menschefrend, Ike Menschfrid, Ike Menschfried, and Angeles, California, by which the petitioner has made proof to my satisfaction that Attorney General of the State of California, Library and Courts Building, Sacramento, California, is a person interested in this proceeding and that he is not a resident of this state, and that personal service of the citation herein cannot with due diligence be made upon him within the state, and by which said petition the petitioner has also made proof to my satisfaction that there are other persons whose residences are unknown or whose names and places of residence are unknown and cannot after diligent inquiry be ascertained by the petitioner, to wit, All heirs at law, next of kin, devisees

legatees, distributees, grantees, assignees, creditors, lienors, trustees, executors, administrators and successors in interest of Ike Menschefrend, also known as I. Menschefrend, Ike Menschfrid, Ike Menschfried, and as Ike Menschfield, Deceased, and if they, or any of them be dead, the respective heirs at law, next of kin, devisees, legatees, distributees, grantees, assignees, creditors, lienors, trustees, executors, administrators and successors in interest of the aforesaid persons, all of whom, and whose names and places of residence are unknown to the petitioner, and cannot be ascertained after due diligence.

Now, on motion of Theodore Garris of counsel for the said Ben H. Brown, petitioner,

ORDERED: That the service of the citation in the above-entitled matter upon the aforesaid persons be made by publication thereof in two newspapers, to wit: in the New York Law Journal published in the County of New York and in the New York Enquirer, published in the County of New York, once a week for four successive weeks; or, at the option of the petitioner, by delivering a copy of the citation to the above-named persons, in person without the state.

AND IS IS FURTHER ORDERED AND DIRECTED, That on or before the day of the first publication, the petitioner deposit in any post office in the State of New York 1 copy of the citation, each contained in a securely closed postpaid wrapper, directed to the following person respectively, at the place designated below: Attorney General of the State of California, Library and Courts Building, Sacramento, California.

AND IT IS FURTHER ORDERED, That service of citation in the above-entitled matter upon those persons whose resi-

dences are unknown or whose names and places of residence are unknown and cannot after diligent inquiry be ascertained by the petitioner herein, to wit: All heirs at law, next of kin, devisees, legatees, distributees, grantees, assignees, creditors, lienors, trustees, executors, administrators and successors in interest of Ike Menschefrend, also known as I. Menschefrend, Ike Menschfrid, Ike Menschfried, and as Ike Menschfield, Deceased, and if they, or any of them be dead, the respective heirs at law, next of kin, devisees, legatees, distributees, grantees, assignees, creditors, lienors, trustees, executors, administrators and successors in interest of the aforesaid persons, all of whom, and whose names and places of residence are unknown to the petitioner, and cannot be ascertained after due diligence be made by publication thereof in two newspapers, to wit: in the New York Law Journal, published in the County of New York, and in the New York Enquirer published in the County of New York, once a week for four successive weeks; or, at the option of the petitioner, by delivering a copy of the citation to the above-named persons in person without the state.

And I, being satisfied by the said petition that the petitioner cannot with reasonable diligence ascertain a place or places where the said persons hereinabove mentioned would probably receive matter transmitted through the post-office, hereby dispense with the deposit of any papers therein.

W. T. C.,
Surrogate.

APPENDIX B

Affidavit of Regularity

SURROGATE'S COURT,
COUNTY OF NEW YORK.

IN THE MATTER OF the Judicial settlement of the Account of Proceedings of BEN H. BROWN, as Ancillary Administrator of IKE MENSCHEFREND, also known as I. MENSCHEFREND, IKE MENSCHFRID, IKE MENSCHFRIED, and as IKE MENSCHFIELD, Deceased.	AFFIDAVIT OF REGULARITY

STATE AND COUNTY OF NEW YORK, ss.:

THEODORE GARRIS, being duly sworn, says that he is the attorney of the petitioner, Ben H. Brown, herein: That all the parties to this proceeding have been duly cited or have duly waived the issuance and service of a citation herein and consented to the entry of a decree settling the account, in the manner and form following, to wit:

I. By service of a copy of the citation issued herein upon the following persons in the manner prescribed by Sections 55 and 60 of the Surrogate's Court Act, as more fully appears by the proof of service thereof, made in the manner and form prescribed by law and filed herein on the 12th day of November, 1952, viz.:

(Name)	(When)	(Where)
NATHANIEL L. GOLDSTEIN Attorney General of the State of New York	October 29, 1952	At N.Y. State Building 80 Centre Street, New York City, New York

Appendix B

(Copy delivered to ALFRED W. JONES, Assistant Attorney General State of New York).

II. By service thereof without the State, or by publication in pursuance of an order made herein on the 6th day of October, 1952, under Sections 56, 56-a, 58-a and 59 of the Surrogate's Court Act, as more fully appears by the proof of service thereof, made in the manner prescribed by law and filed herein on the 12th day of November, 1952, viz.: On Attorney General of the State of California, and all heirs at law, next of kin, devisees, legatees, distributees, grantees, assignees, creditors, lienors, trustees, executors, administrators and successors in interest of Ike Menschefrend, also known as I. Menschefrend, Ike Menschfrid, Ike Menschfried, and as Ike Menschfield, Deceased, and if they, or any of them be dead, the respective heirs at law, next of kin, devisees, legatees, distributees, grantees, assignees, creditors, lienors, trustees, executors, administrators and successors in interest of the aforesaid persons, all of whom, and whose names and places of residence are unknown to the petitioner, and cannot be ascertained after due diligence.

III. Personally or by attorney by duly executed waivers of the issuance and service of the citation of the account filed herein and a consent to the entry of a decree settling the same and filed herein on the 12th day of November, 1952, by Fidelity & Deposit Company of Maryland, 140 William Street, New York City, New York, surety.

IV. That no notice of appearance has been filed herein, except by Hon. Nathaniel L. Goldstein, Attorney General of the State of New York, by Flavius N. Costerella, Assistant Attorney General.

Appendix B

That all of the persons named above are of full age and are of sound mind, excepting those hereinbefore stated to be otherwise, and comprise all the parties, as deponent verily believes, who have any interest in this proceeding.

THEODORE GARRIS.

Sworn to before me this
30th day of June, 1953.

JAMES A. DOVRES,
James A. Dovres,
Notary Public,
State of New York.
No. 24-1007750.
Qual. in Kings Co.
Certs. filed with Bronx & N. Y. Co. Clerks.
Kings, Bronx & N. Y. Co. Registers.
Term Expires March 30, 1955.

N. B.—Where a person cited is an infant, a lunatic, an habitual drunkard, or for any cause mentally incapable adequately to protect his rights, it must so appear in the foregoing affidavit. The age of the infant must also be stated.

APPENDIX C

Surrogate's Court Act, § 164

§ 164. *Persons acting under ancillary letters must transmit assets.* The person to whom ancillary letters are issued as prescribed in this article, must unless otherwise directed in the decree awarding the letters; or in a decree made upon an accounting; or by an order of the surrogate, made during the administration of the estate; or by the judgment or order of a court of record, in an action to which that person is a party; transmit the money and other personal property of the decedent, received by him after the letters are issued, or then in his hands in another capacity, to the state, territory, or county, where the principal letters were granted to be disposed of pursuant to the laws thereof.